Phoenix Programs of New York, Inc. *and* District 6, International Union of Industrial, Service, Transport and Health Employees. Case 2–CA–32424

December 21, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

Pursuant to a charge filed by the Union on September 1, 1999, the General Counsel of the National Labor Relations Board issued a complaint on October 20, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 2–RC–22096. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 22, 1999, the General Counsel filed a Motion for Summary Judgment. On November 24, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and the Charging Party joined in the General Counsel's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding. Specifically, the Respondent renews its contention, raised and rejected in the underlying representation proceeding, that the petitioned-for and certified single-facility unit is inappropriate, and that the only appropriate unit consists of employees at all 13 of its facilities in the State of New York.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New York corporation, with an office and place of business located at 164 West 74th Street, New York, New York, has been engaged in the business of operating a drug rehabilitation and therapeutic facility. The Respondent is a health care institution within the meaning of Section 2(14) of the Act. Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of $250,000, and purchases and receives at its facility goods and services valued in excess of $5000 directly from suppliers located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[1]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held August 12, 1999, the Union was certified on August 20, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Included: All full-time and regular part-time counselors, cooks and maintenance workers employed by the Employer at its facility located at 164 West 74th Street, New York, New York.
>
> Excluded: All other employees, clerical employees, and guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since August 25, 1999, the Union has requested the Respondent to bargain, and, since August 30, 1999, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

[1] The Respondent's answer denies information sufficient to form a belief as to the truth of the complaint allegation that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. This denial, however, does not raise an issue warranting a hearing. The Respondent stipulated in the underlying representation proceeding that the Union is a 2(5) labor organization, and the Regional Director so found in his Decision and Direction of Election. Moreover, the Board has previously found that the Union is a 2(5) labor organization. See, e.g., *Heritage at Norwood*, 322 NLRB 231 (1996).

CONCLUSION OF LAW

By refusing on and after August 30, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Phoenix Programs of New York, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with District 6, International Union of Industrial, Service, Transport and Health Employees as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and regular part-time counselors, cooks and maintenance workers employed by the Employer at its facility located at 164 West 74th Street, New York, New York.
>
> Excluded: All other employees, clerical employees, and guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 21, 1999

John C. Truesdale,	Chairman
Peter J. Hurtgen,	Member
J. Robert Brame III,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with District 6, International Union of Industrial, Service, Transport and Health Employees as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

Included: All full-time and regular part-time counselors, cooks and maintenance workers employed by us at our facility located at 164 West 74th Street, New York, New York.

Excluded: All other employees, clerical employees, and guards, and supervisors as defined in the Act.

PHOENIX PROGRAMS OF NEW YORK, INC.